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In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and its Agent, JULIUS HELFER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, LEXINGTON ELECTRIC PRODUCTS CO., INC., and IMPERIAL SWITCHBOARD, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 700

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and its Agent, JULIUS HELFER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, LEXINGTON ELECTRIC PRODUCTS CO., INC., and IMPERIAL SWITCHBOARD, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21-28) is reported at 283 F. 2d 54. The decision and order of the National Labor Relations Board (R. 3a-17a)[1] are reported at 124 NLRB 1400.

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[1] "R." refers to the Joint Appendix filed with the court below.

JURISDICTION

The decision of the court of appeals was issued on September 29, 1960, and a decree was entered on December 9, 1960 (Pet. 21, 29). The petition for a writ of certiorari was filed on February 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the union, in violation of Sections 8(b)(2) and (1)(A) of the National Labor Relations Act, caused the employer, in violation of Sections 8(a)(3) and (1), to discharge 18 employees because they were not members of, or represented by, the union.

2. Whether, under the special facts of this case, the court of appeals could properly modify the Board's order—which imposed a joint and several liability for back pay—to make the union primarily liable for reimbursing the discharged employees, and the employer, only secondarily liable.

3. Whether the Board acted within its authority under Section 10(c) of the Act, to provide such remedy "as will effectuate the policies of [the] Act," in exempting the employees discriminated against, for a period of two years following the date of reemployment, from the requirements of any union-security agreement which the union might have with the employer.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, 61 Stat. 136, as amended, are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * * *
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> > (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *;
> >
> > * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) * * *.

* * * *

SEC. 10 * * *

* * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

STATEMENT

A. The Board's Findings of Fact

Respondent Lexington Electric Products Co., Inc., operates a plant in Newark, New Jersey, where it manufactures and assembles electrical equipment (R. 18a; 60a-61a). It employs about 145 employees who have been represented by petitioner Local 3 for over 20 years (R. 22a; 121a). The ownership and managerial control of Lexington are vested in Napoleon Tischler, who is in charge of the New York City sales office, and I. V. Cole, who exercises virtually complete authority over the manufacturing and production processes (R. 20a; 60a-61a, 100a).

In response to increasing business opportunities and in view of the Lexington plant's inability to maintain production at a level which would satisfy sales commitments, Cole, early in 1957, decided to establish another plant to which excess work could be directed (R. 20a-21a; 61a, 67a). Accordingly, in May or June 1957, Cole and four other persons formed respondent Imperial Switchboard, Inc., and located the plant at Union, New Jersey (R. 21a; 61a-62a, 63a-64a, 119a). Cole was the principal investor in Imperial, holding a 50 percent interest (R. 21a; 62a). None of the capital stock of Imperial was ever issued to investors (R. 21a; 62a, 166a-167a). Imperial operated only as an assembly plant (R. 22a; 65a-66a). Seventy-five percent of the work performed by Imperial came directly from Lexington; only 25 percent was acquired independently of Lexington, and some of that was attributable to Imperial's relationship with Lexington (R. 22a, 33a-34a; 167a-168a). Cole was the actual operating head of both companies and handled labor relations at both (R. 32a, 34a-35a; 61a, 65a, 111a-113a). Imperial had 18 rank-and-file employees at the time it shut down, as described below (R. 19a, 21a; 120a).

During July and August 1957, Helfer, Local 3's business representative, told Cole that Lexington employees were in fear of losing earnings as a result of operations at Imperial and that the creation of Imperial violated the collective bargaining agreement (R. 23a, 25a, 36a-37a; 122a-126a).[2] Helfer further

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[2] Section 27 of the contract provided: "The employer agrees not to move its manufacturing plant or any machin-

told Cole, "[He] didn't think it would be fair to operate a union shop and the nonunion shop * * *" (R. 25a, 37a-38a; 128a). Cole replied that other interests were involved in Imperial, and therefore he could not summarily close the plant (R. 25a; 71a). As a result of Cole's refusal to close Imperial, Local 3 struck Lexington on September 24, 1957 (R. 24a; 90a).[3]

Earlier, on September 12, 1957, Local 3, aware that within its grant of geographical jurisdiction it could not properly enter the Imperial plant at Union, New Jersey, communicated with Local 1159, an IBEW sister local within whose jurisdiction the Imperial plant was located, and requested permission for Local 3 to represent the Imperial employees (R. 30a; 106-111a). Local 1159 denied this request (*ibid.*). Subsequently, Local 1159 was recognized by Imperial as the bargaining representative of a majority of its employees, many of these employees having been members of Local 1159 while working in other shops in the area (R. 23a-24a; 114a-117a).

Notwithstanding Imperial's recognition of Local 1159, Helfer contended that Local 3 would not tolerate the continued existence of Imperial as long as

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ery used in connection with the manufacturing of electrical products, etc. from the geographical confines of New York City during the life of this agreement." As a matter of fact, Lexington had not moved its plant and had not moved any machinery out of its plant (R. 37a; 66a).

[3] On October 2, 1957, Lexington filed a charge with the Board alleging that the Union's strike constituted a violation of Section 8(b)(4)(A) and (B) of the Act. These charges were dismissed (Pet. 25).

Local 3 was not the bargaining representative in that plant (R. 26a; 72a). Thus, at a meeting in late September 1957, attended by Cole, his assistant, Martin Tischler, Helfer, and the Lexington shop committee, Helfer declared that "Imperial could not exist unless merged and all employees covered by the Local 3 Contract" (R. 38a; 68a, 70a). At a meeting in October 1957, Helfer again stated his opposition to the continued existence of Imperial and demanded "that the Imperial men * * * be brought into Lexington and signed up under Local No. 3 contract" (R. 40a; 103a). And, at a strike settlement meeting, Helfer added that Local 3 would not tolerate, so close to a Local 3 plant, any other shop in which another union had jurisdiction (R. 29a-30a; 72a).

Moreover, on several occasions during the strike at Lexington Local 3 sent representatives to the Imperial plant in an attempt to persuade the employees there to accept employment either at Lexington or at other shops in which Local 3 was the bargaining representative (R. 41a; 154a-157a).[4] Although Local 3 stated its objective only as the retention of work at Lexington, shop steward Byers testified that the purpose of the strike would not have been satisfied merely by the return of the work, but that the strike would have continued until Imperial no longer remained in existence (R. 39a; 146a).

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[4] In the course of one such appeal, Carberry, a shop steward at Lexington, displayed literature describing benefits which were received as a result of Local 3's collective bargaining (R. 41a; 154a-157a).

On October 18, 1957, the Lexington strike was settled as a consequence of a meeting with a Lexington customer whose work was delayed by the dispute (R. 27a; 138a-141a, 158a-160a). The terms of the settlement, to which Cole acceded, were that Imperial was to be permanently closed, all work and orders were to be returned to Lexington, and the Lexington strikers were to be paid for all lost time (*ibid.*). Accordingly, Cole, who a week earlier had acquired all the other interests in Imperial, closed Imperial on October 20, 1957 (R. 28a; 74a-75a). All Imperial employees were discharged, although ultimately three were hired by Lexington (*ibid.*).

B. The Board's Conclusions and Order

On the foregoing facts, the Board concluded that the Imperial employees were discharged for not being members of, or represented by, Local 3, that the Union and Helfer violated Section 8(b)(2) and (1)(A) of the Act by causing their discharge for this reason, and that the Companies[5] violated Section 8(a)(3) and (1) of the Act by acceding to the discharge demands (R. 3a, 42a).

The Board's order required the Union and the Companies to cease and desist from violating the above sections of the Act (R. 6a-7a). Affirmatively, the order required the Companies to offer the employees reinstatement at the Imperial plant if it is reopened, and if not, to provide employment for them

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[5] The Board found that Lexington and Imperial constituted a single joint employer (R. 36a).

at the Lexington plant, dismissing, if necessary, employees hired since the date of the discrimination, and placing any employees for whom work is not immediately available on a preferential hiring list (R. 3a-6a, 7a). The order further directed the Companies and the Union, jointly and severally, to make the dischargees whole against losses suffered as a result of the discrimination against them, and to post the usual appropriate notices (R. 10a). Finally, the order provided, with respect to discriminatees employed by Lexington in compliance with the order, that, for a period of two years following the date of employment, such employees shall be free of the requirements of any agreement requiring membership in the Union as a condition of employment (R. 7a, 9a).

C. The Decision of the Court of Appeals

The court of appeals upheld the Board's unfair labor practice findings as supported by substantial evidence on the total record (Pet. 23), and enforced the Board's order with some modification.

The court specifically sanctioned the two-year suspension of the union-security clause insofar as those discriminatees who may be employed by Lexington are concerned, finding that it was a "remedy which is reasonably adapted to correct the injurious effects" of the unfair labor practices committed (Pet. 24). However, the court disapproved of the provision of the Board's order imposing joint and several liability upon both the Union and the Companies. Recognizing that such liability was appropriate in the usual case of a discharge occasioned by union insistence, the

court concluded: "This case discloses special and unusual circumstances which in our view make it patently inequitable that the employer be more than secondarily responsible for back pay." (Pet. 27.) In the court's view, the fact that Lexington had resisted the Union's efforts to the point of filing an unfair labor practice charge, and that no action was taken on the charge at that time, warranted modification of the Board's order to impose primary liability solely upon the Union and to make the Companies' liability only secondary (Pet. 27-28).

ARGUMENT

1. Under the doctrine of *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, the petition for certiorari was untimely filed. The opinion of the court, which contained its judgment (see Pet. 28), was entered on September 29, 1960 (Pet. 21). The petition for certiorari was not filed until February 7, 1961, which was more than 90 days later. Nor was the time for filing a petition extended by the fact that the court entered a decree on December 9, 1960 (Pet. 29), for that decree did not change any matter of substance or resolve any ambiguity in the decision of September 29. Compare Brief for the National Labor Relations Board in Opposition, p. 8, *Dallas General Drivers, Warehousemen and Helpers Local Union No. 475* v. *National Labor Relations Board*, No. 638, this Term.

2. As to the merits, petitioners misconceive the decision of the court below in contending that it bans a

strike in protest against a "partial runaway shop" and a breach of contract by the employer (Pet. 2, 11-13). The Board's finding, affirmed by the court below, is that the Union struck Lexington, not in support of legitimate economic objectives,[1] but rather to procure the discharge of the Imperial employees because they were not members of, or represented by, the Union (R. 41a; see R. 3a). Accordingly, petitioners' attack on the court's decision reduces itself to the question of whether there is substantial evidence to support the finding of unlawful motive. This issue does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Moreover, the record amply supports the conclusion that concern over union membership, and not over loss of orders, motivated the Union's action in this case. As shown above (pp. 5-7, *supra*), the Union told Cole that it was not "fair to operate a union shop and nonunion shop"; that "Imperial could not exist unless merged and all employees covered by the Local 3 contract"; and that, to settle the strike, "the Imperial men would have to be brought into Lexington and signed up under Local No. 3 contract." Union Steward Byers admitted that return of the work to Lexington would not have satisfied the strike objective, and that the strike would have continued until Imperial was out of business. Finally, the Union

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[1] The Board noted that Lexington did not, in any event, violate the contract, as it moved neither its plant nor its machinery, and that nothing in the contract precluded the opening of a new nearby facility (R. 37a).

struck Lexington only after it failed in its efforts to become the bargaining representative of the Imperial employees by having a sister local, which had jurisdiction in the Imperial area, relinquish its claim.[7]

3. Contrary to petitioners' contention (Pet. 13-15), the modification by the court of appeals of the Board order, so as to impose primary liability for back pay upon the Union and only secondary liability upon the Companies, does not upset long-established precedent. The court specifically recognized the propriety of imposing joint and several liability upon both the union and the employer in the typical case where an employer gives in to union pressure and illegally discharges employees. To the court, however, the instant case presented an additional element which did not exist in prior cases, namely, that Lexington filed unfair labor practice charges with the Board, which were dismissed (see footnote 3, *supra*, p. 6), prior to its capitulation to the Union's unlawful demands. As

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[7] *National Labor Relations Board* v. *Lewis*, 246 F. 2d 886 (C.A. 9), cited by petitioners (Pet. 12), is clearly distinguishable on its facts. The court there enforced a Board order, based upon findings that the Company violated Sections 8(a)(3), (4) and (5) of the Act by, *inter alia*, refusing to bargain with the certified union regarding a total move of business operations, physically moving its plant and setting up a "front" corporation in order to disregard the union, engaging in unlawful interrogation and surveillance of its employees, and refusing to bargain with the certified union at the new plant location. In short, *Lewis* involved a situation where the company's entire course of action, although occurring in the context of an economic move, was specifically designed to dissipate the majority status of the union.

the court stated, "[I]t was only after unsuccessful invocation of the normal legal remedy against an unfair labor practice strike that the employer yielded to economic coercion" (Pet. 25). In view of this special factor, the court was not unreasonable in departing from the usual rule, and its action in doing so presents no issue of general importance warranting review by this Court.

4. The provision of the Board's order, requiring that the dischargees, upon their employment at the Lexington plant, be afforded a period of two years before being subjected to any union-security agreement requiring membership in the Union as a condition of employment, was well "adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. As the court below noted (Pet. 24), normally "an unfair termination of employment at Imperial because of nonmembership in a union would have been redressed by a requirement that the employees be restored to work status at Imperial free of any obligation to join the Union. But here the union had made this impossible by insisting upon the closing of the Imperial plant." Accordingly, the Board had to provide for reemployment of the dischargees at the Lexington plant, while, at the same time, insuring that the Union could not, in turn, require that they become members under the union-security agreement that it had there. In short, without the suspension of the union-security provision, the Union would have been able to accomplish the very

purpose which had led to the commission of the original unfair labor practices (R. 4a-5a; 45a-46a).*

There is no substance to petitioners' contention that the suspension of the union-security agreement with respect to the discriminatees contravenes the due process clause of the Fifth Amendment (Pet. 3, 15-17). The cases cited in support of this contention stand only for the proposition that an exclusive bargaining agent is obligated to represent all employees in the bargaining unit fairly and without racial or hostile discrimination of any kind. This duty of fair representation, however, is not contingent upon the bargaining agent having a correlative right to require that the employees represented become members of the union. As shown by this Court's decision in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 335 U.S. 525, the due process clause erects no obstacle to a total ban on union security arrangements. It follows that the limited suspension here of such an arrangement likewise presents no constitutional problem.

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* As the Board pointed out (R. 5a): "Of course, the discriminatees remain free to join the Respondent Union at any time if they so desire."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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